



## **Agricultural Marketing Service**

### **7 CFR Part 984**

**[Doc. No. 22-J-0011; AMS-SC-22-0010; SC22-981-1]**

## **Marketing Order for Walnuts Grown in California; Recommended Decision and Opportunity to File Written Exceptions**

**AGENCY:** Agricultural Marketing Service, Department of Agriculture (USDA).

**ACTION:** Proposed rule and opportunity to file exceptions.

**SUMMARY:** This recommended decision proposes amendments to Marketing Order No. 984 (Order), which regulates the handling of walnuts grown in California. The proposed amendments are based on the record of a public hearing held via videoconference technology on April 19 and 20, 2022. The California Walnut Board (Board), which locally administers the Order, recommended proposed amendments that would eliminate mandatory inspection and certification of inshell and shelled walnuts, and of shelled walnuts for processing; create a new mechanism for determining and collecting handler assessments; add authority to charge interest for late payments; establish an assessment rate of \$0.0125 per inshell pound of walnuts; expand the definition of “to handle” to include “receive”; and remove volume control authority. In addition, the Agricultural Marketing Service (AMS) proposed to make any such changes to the Order as may be necessary to conform to any amendment that may result from the hearing.

**DATES:** Written exceptions must be filed by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Written exceptions should be filed with the Hearing Clerk, U.S. Department of Agriculture, Room 1031-S, Washington, DC 20250-9200; Fax: (202) 720-9776 or via the internet at <https://www.regulations.gov>. All comments should reference

the docket number and the date and page number of this issue of the **Federal Register**.

Comments will be made available for public inspection in the Office of the Hearing Clerk during regular business hours or can be viewed at <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Geronimo Quinones, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202)308-2339 or Matthew Pavone, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, or Email: [Geronimo.Quinones@usda.gov](mailto:Geronimo.Quinones@usda.gov) or [Matthew.Pavone@usda.gov](mailto:Matthew.Pavone@usda.gov).

Small businesses may request information on this proceeding by contacting Richard E. Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, or Email: [Richard.Lower@usda.gov](mailto:Richard.Lower@usda.gov).

**SUPPLEMENTARY INFORMATION:** Prior documents in this proceeding: Notice of Hearing published in the April 1, 2022, issue of the **Federal Register** (87 FR 19020).

The recommendation is in conformance with the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Orders 12866, 13563, and 13175.

Notice of this rulemaking action was provided to tribal governments through the Department of Agriculture's (USDA) Office of Tribal Relations.

### **Preliminary Statement**

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to the proposed amendments to 7 CFR part 948 (hereinafter referred to as "Marketing Order 984" or the "Order") regulating the handling of walnuts grown in

California and the opportunity to file written exceptions thereto. Copies of this decision can be obtained from Geronimo Quinones, whose address is listed above.

This recommended decision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the “Act,” and the applicable rules of practice and procedure governing the formulation and amendment of marketing agreements and orders (7 CFR part 900).

The proposed amendments are based on the record of a public hearing held via videoconference technology on April 19 and 20, 2022. Notice of this hearing was published in the **Federal Register** on April 1, 2022 (87 FR 19020). The notice of hearing contained five proposals submitted by the Board and one submitted by USDA.

The proposed amendments were recommended to the Secretary by the Board on October 28, 2021. After reviewing the proposals and other information submitted by the Board, USDA decided to schedule this matter for a hearing. The Board’s proposed amendments to the Order would amend quality control provisions to remove inspection and certification requirements, create a new mechanism for determining and collecting handler assessments, add authority to charge interest for late payments, establish an assessment rate of \$0.0125 per inshell pound of walnuts; expand the definition of “to handle” to include “receive”, and remove volume control authority.

As proposed, inspection and certification of outbound walnuts would no longer be required, and handler assessments would be calculated based on a proposed assessment rate, recommended by the Board, and applied to handler’s inbound walnuts receipts instead of outbound walnuts certified.

USDA proposed to make any such changes as may be necessary to the Order to conform to any amendment that may be adopted, or to correct minor inconsistencies and typographical errors.

Ten witnesses testified at the hearing. Nine witnesses represented walnut producers and handlers in the production area, as well as the Board, and one witness was from USDA. All nine industry witnesses supported the proposed amendments. The USDA witness remained neutral. After the notice of hearing was published in the **Federal Register**, AMS received a substantive email from the Board. In accordance with § 900.16 of the Rules of Practice governing this proceeding (7 CFR 900.16), the email constituted an ex parte communication and was entered into the record but did not constitute testimony and was not considered in the drafting of this recommended decision.

Under the Order, quality control provisions require inspection and certification of outbound walnuts, volume regulation is stayed indefinitely, and the authority to charge for late payments does not exist. The Board's proposed amendments would eliminate the inspection and certification of outbound walnuts, remove volume authority, establish a new mechanism for the collection of assessments and provide authority to charge interest for late payments.

Currently, a moratorium on the enforcement of inspection is in effect, and while under the moratorium, the Board is unable to collect assessments. If implemented, the proposed amendments would allow the Board to resume the collection of assessments applied to walnuts received and to charge interest for late payments. Assessments would be determined by handler receipts for total walnuts received for the crop year, multiplied by the proposed new assessment rate of \$0.0125, and billings would be staggered throughout the marketing year to allow handlers to pay in three installments.

Witnesses at the hearing explained that the proposed amendments are necessary to streamline the Order and would make the industry more efficient by eliminating redundancies in inspection, reducing costs and administrative burden to handlers and the

Board, and providing a cost saving to growers. Therefore, proponents support the need to modernize the Order to better meet current and future industry needs.

As an indicator for the need to eliminate inspection and certification of outbound walnuts, witnesses stated that the moratorium issued by USDA on September 2, 2021, of mandatory inspections has not adversely affected the quality of California walnuts produced and handled. Witnesses testified that a common practice for the industry is to conduct quality assurance inspections on inbound shipments of walnuts and that the current regulations require inspections on the outbound walnuts. The end result of industry practice and regulatory requirements is two forms of inspection being conducted in the industry. Further, witnesses contended that significant investments and advancement in processing, storage, technology, and equipment have ensured better programs that are able to maintain higher walnut quality and condition that exceed the minimum grades and standards currently set forth in the Order.

At the conclusion of the hearing, the Administrative Law Judge established a deadline of May 19, 2022, for the submission of corrections to the transcript, and June 23, 2022, as a deadline for interested persons to file proposed findings and conclusions or written arguments and briefs based on the evidence received at the hearing. The Board filed a brief in support of the proposed amendments.

### **Material Issues**

The material issues presented on the record of hearing are as follows:

1. Whether to modify § 984.50, Grade, quality, and size regulations, to remove quality and size regulations and include only the Board's authority and eliminate §§ 984.51 and 984.52 inspection and certification of inshell and shelled walnuts and shelled walnuts for processing. This includes revising: §§ 984.12, 984.32, 984.64, 984.69, 984.77, 984.459(a)(3), and 984.472(b) and removing: §§ 984.450(c), 984.451(a) and (b), 984.452, and 984.464(b) and (c).

2. Whether to revise § 984.69 by changing the calculation of assessments from kernelweight to inshell pound in paragraph (a) and revising paragraph (c) to include an authority to charge for late payments and/or interest as prescribed by the Board with approval from the Secretary. Corresponding changes would be made to §§ 984.37, 984.48, 984.69, and 984.347.

3. Whether to revise § 984.347 to establish an assessment rate of \$0.0125 per inshell pound of walnuts.

4. Whether to modify the definition in § 984.13 of “to handle” to include “receive”.

5. Whether to remove § 984.49, Volume regulation, reserve pool authority, and subsequent sections including provisions for volume control. This includes removing: §§ 984.23, 984.26, 984.33, 984.54, 984.56, 984.66, 984.69(b), 984.450(a) and (b), 984.451(c), 984.456, and 984.464(a) and revising: §§ 984.48 and 984.67.

6. Whether any conforming changes need to be made as a result of the above proposed amendments. Conforming changes may also include correction of non-substantive, typographical errors.

### **Findings and Conclusions**

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof.

### **Material Issue Number 1 – Grade, Quality, and Size Regulations and Inspection and Certification**

Section 984.50 “Grade, quality and size regulations” should be amended to remove quality and size regulations and only the authority should remain. Removing quality and size regulations would remove the minimum grade and size requirements for shelled and inshell walnuts. Retaining the authority would allow the Board to recommend handling regulations and establish inspection and certification requirements

if market conditions warrant regulations in the future, subject to the approval of the Secretary.

Sections 984.51 “Inspection and certification of inshell and shelled walnuts” and 984.52 “Processing of shelled walnuts” should be removed. Removing inspection and certification would eliminate mandatory outbound inspections for all varieties of walnuts, walnuts for processing, and inspections applied to walnuts imported into the United States under section 608e of the Act. In addition, multiple sections of the Order with provisions for quality, grade and size, and inspection and certification should be revised. This includes revising: §§ 984.12, 984.32, 984.64, 984.69, 984.77, 984.459(a)(3), and 984.472(b). Conforming changes would include removing §§ 984.450(c), 984.451(a) and (b), 984.452, and 984.464(b) and (c). Furthermore, a conforming change to completely remove the word “merchantable” from §§ 984.22, 984.72, and 984.472(a) and (c) is necessary to add clarity to the Order. This conforming change will be further discussed in Material Issue #6.

Currently, § 984.50 requires that handlers must meet minimum grade, quality, and size regulations and §§ 984.51 and 984.52 require that outbound walnuts must be inspected and certified. The outbound inspection is carried out by the Dried Fruit Association of California (DFA), the Board’s inspection agency of record. DFA supplies to the Board inspection records used to calculate handler assessment obligations.

Witnesses at the hearing, either serving as Board members and/or as members of the Board’s Marketing Order Revision Committee explained that the proposed amendments would modernize and align the Order with current market-driven practices. This would result in a more efficient industry. Witnesses further explained that advancements in processing and packaging technologies have improved product quality, consistency and shelf-life and if implemented, the proposed amendments would remove redundancies, as well as reduce costs and administrative burden for both handlers and the

Board. Evidence introduced at the hearing suggests that mandatory inspection and certification are no longer necessary to ensure orderly marketing; however, the authority should be retained in the Order in the event market conditions change and inspections and certification are deemed necessary to be reintroduced.

According to the hearing record, walnut production and sales have grown substantially over the past 73 years. The initial varieties regulated by the Order no longer exist and are not viable in either domestic or international markets. In addition, handlers have made significant investments in the technology and equipment necessary to maintain high quality walnuts that customers demand and that consumers expect. These investments helped to manage over 300,000 tons in increased production, according to a witness. Witnesses testified that current customer specifications exceed the grades and standards established when the Order was promulgated in 1948. The industry considers the minimum grade and size regulations as outdated and obsolete, and that the mandated outbound inspection has resulted in inefficient redundancies. The costs of the duplicative inspections outweigh their benefit to industry.

A moratorium of enforcement on mandatory inspection requirements is currently in effect. Under the moratorium, USDA's enforcement of mandatory inspection requirements under the Order are suspended. Accordingly, inspection and certification requirements for walnuts imported into the United States are also suspended. USDA exercised its discretion to issue the moratorium, effective September 1, 2021, following discussions with the Board. These discussions took place after the Board's Grades and Standards Committee recommended an action, subsequently passed by the Board, to request that USDA forego mandatory inspections in response to market disruptions associated with the Covid-19 pandemic, including labor and transportation interruptions, and ongoing tariff issues that have adversely affected market conditions across the California walnut industry. Witnesses explained that, in addition to external shipping



constraints, DFA inspector shortages caused huge operational inefficiencies, because handlers cannot ship product that is not inspected, certified, and stamped. Further, eliminating outbound inspections would remove large expenditures by eliminating the duplicative inspections.

According to the record, mandated inspections identified as duplicative by witnesses cost the industry approximately \$6 million annually (discussed further under Economic Impact of Eliminating Mandatory Inspection). Witnesses testified that the elimination of mandatory outgoing inspection would benefit all handlers immediately through lower expenditures and avoidance of shipping delays due to inspector unavailability. These handler benefits could also be passed on to producers and consumers.

According to the record, market demand for California walnuts continues to grow. Evidence introduced suggests that increased industry investments in infrastructure, as well as marketing and promotion, were in response to growing domestic and global walnut production. Over the past five years, increases in international production have affected U.S. market prices and net grower returns. Record evidence also indicates that total world production increased by over 235,000 metric tons from 2017/18 to 2021/22; however, California walnuts, even with increases in production, accounted for a smaller share of total world production, decreasing from 29 to 27 percent during the same time period. Other countries have experienced growth; most notably, China now accounts for 49 percent of world production compared to 42 percent in 2017/18. China's share of world trade has risen to 13 percent, a significant increase from 2 percent in 2016/17. Consequently, California walnuts account for a smaller share of world trade, falling from 68 to 54 percent between 2016/17 and 2020/21.

Hearing evidence included data from studies conducted by the University of California-Davis Cooperative Extension (UC Davis) that highlight changes in walnut

farm profitability by comparing farm revenue per acre and cost of production. The UC Davis data, illustrated in Table 1, include two cost of production studies conducted in the 2011-2014 time period, and three studies between 2015 and 2018.

Table 1 shows the decline in walnut farm profitability by comparing two four-year periods with very different financial outcomes, 2011 to 2014 and 2015 to 2018. The average production cost per acre for 2011-2014 and 2015-2018 were \$3,667 and \$5,122, respectively, which appear in column (d) of Table 1. Average yields (1.83 and 2.01 tons per acre in the same time periods) appear in column(b) of Table 1. Producer gross returns per acre for each of the two four-year time periods column (c) were computed by multiplying average yield by average price. Subtracting cost of production in column (d) yields the producer net return in column (e).

Table 1. California walnuts: Producer gross return, cost of production, net return

<b>Range of Years</b>	<b>Season average producer price, \$/ton 1/</b>	<b>Average yield: Tons per acre 2/</b>	<b>Average producer gross return per acre</b>	<b>Total cost of production per acre 3/</b>	<b>Producer net return per acre (gross return minus cost)</b>
	<b>(a)</b>	<b>(b)</b>	<b>(c)</b>	<b>(d)</b>	<b>(e)</b>
			<b>(a)*(b)</b>		<b>(c) - (d)</b>
2011-2014	\$3,245	1.83	\$5,930	\$3,667	\$2,264
2015-2018	\$1,828	2.01	\$3,664	\$5,122	-\$1,458

1/ Source: National Agricultural Statistics Service (NASS), USDA.

2/ Four-year averages computed in Table 1, based on annual NASS yield data.

3/ Based on U. of California Extension cost of production studies. For 2011-2014, the cost of production per acre is a two-year average (2012, 2013). For 2015-2018, the cost per acre is a 3-year average (2015, 2017, 2018).

The two producer net return numbers in column (e) of Table 1 are the key results of this cost and return analysis. Four years of walnut farm profitability, represented by producer net return per acre of \$2,264 for 2011-2014, were followed by four years of difficult market conditions (2015-2018), with a negative average net return of (-\$1,458).

This analysis provides a numerical estimate that bears out witness testimony that emphasized a dramatic downward shift in their economic well-being.

The hearing record indicates that grower prices in 2019/20 and 2020/21, when compared to the cost of production in recent years shown in Table 1, indicate continuing negative net returns to California walnut growers, on average.

In 2020/21, walnut crop value fell to approximately \$957 million, and the season average grower price of \$1,220 per ton was the lowest since 2003/04. One witness testified that walnut farmers face challenging market conditions and that he does not foresee improvement in the current season (2021/22). Approximately, 80 percent of the Board's budget is allocated to domestic marketing; however, domestic consumption of walnuts has stayed the same for many years, at approximately one-half pound per person. Witnesses stated that handlers are struggling, and growers are losing their farms. Witnesses explained that if the proposal were implemented, the approximately \$6 million in savings at the handler level could be distributed across the market through higher grower returns. Consumers are also expected to benefit through improved pricing.

According to the record, walnut varieties considered during the establishment of the Order no longer exist and are not viable in domestic and international markets. Evidence suggests that this is due to customer specifications that exceed the minimum grade, quality, and size regulations currently prescribed under the Order for shelled and inshell walnuts. Witnesses explained that consumers, especially in export markets, have high expectations due to the superior quality attributes of newer varieties. Production has declined for older varieties that do not contain the quality traits desired by consumers, notably those varieties that were considered when the Order was promulgated in 1948. Because they were based on lower quality walnuts, the minimum quality requirements prescribed under the Order are no longer consistent with current-day handling operations. In addition, witnesses testified that

product packed to USDA minimum quality guidelines would most likely be rejected by their customers and result in complaints from consumers.

Increased demand for higher quality walnuts, both domestically and internationally, are driving the production of new varieties. One witness testified that over 90 percent of California walnut production is composed of three varieties, the Chandler, the Howard, and the Tulare. These varieties, notably the Chandler, which is 58 percent of total California walnut production, contains much less inedible material than previous varieties that were more susceptible to insect damage and low-quality kernels due to color and other factors.

According to the record, the harvest season generally begins in mid-September and concludes during the first week of November. Witnesses explained that when handlers receive harvested walnuts, they undertake an inbound inspection. Although the specific steps may vary between handlers, inbound inspection is considered a standard business practice. Evidence further suggests that due to consumer expectations and specifications, inbound inspection and quality control processes are much more stringent than the outbound inspection required under the Order. One witness testified that during the inbound inspection, the value of the product is assessed by taking an initial sample and testing for moisture, debris, and foreign material. Evidence suggests that this is a critical step in the inbound inspection process performed by almost all handlers. Witnesses testified that handlers either have a third-party perform the inbound inspection or conduct it themselves in-house, but the inspection process is routine within industry. Moisture testing has proven to be a key indicator of potential microbial growth, which can increase degradation rates, an important measurement of shelf-life.

Further evidence suggests that Board funding of research on behalf of the industry has contributed significantly to the quality advancements of walnuts produced and handled.

According to the record, handlers consider product to be at “equilibrium” when moisture is below 8 percent. This is based on Board-funded research conducted by the UC Davis.

In addition, individual handler investments in technology and storage have also resulted in improved internal quality control across the industry. Evidence suggests that the evolution of inbound inspections and quality control processes are also due to higher customer specifications of quality. Both large and small handlers testified about the positive industry impact of adopting different methodologies that have been scientifically proven to reduce degradation, such as modified atmosphere storage, pasteurization, and fumigation. One witness testified that handlers employ their own quality assurance or quality control staff to inspect product, using quality specifications that exceed the USDA grade standards used by DFA in conducting inspections - inspections that the industry considers to be duplicative. The in-house quality control staff also conduct additional analytical tests for quality and condition, such as the moisture testing previously mentioned, microanalysis for microbial activity and measurement of peroxide and free fatty acid levels for rancidity. Additionally, investments in technology have facilitated advancements in electronic processing, such as laser or high-speed camera and x-ray machines that separate constituents on conveyor belts significantly reducing foreign material counts.

Witnesses explained that these advancements, coupled with highly trained quality assurance personnel, significantly increased walnut quality to a level that significantly exceeds USDA’s minimum quality standards established in 1948. In addition, one handler witness that utilized both in-line (inspection prior to packing) and floor inspections (inspection after packing) offered by DFA, testified that both shelled and inshell walnuts rarely failed USDA inspection and that walnuts that do not meet the requirements of the Order accounted for a very small percent of total product processed. Therefore, the witness stated, handlers were only conducting outbound inspections to comply with the

Order and to report the quantity of walnuts handled for the calculation of assessments as specified in § 984.69.

As evidenced by the record, walnut sales are driven by consumer demand for high quality product and marketplace competition, both domestically and internationally, which provide strong incentives to remove all substandard walnuts.

If implemented, the proposed amendment would result in greater cost efficiencies by eliminating inspection redundancy, significantly lowering cost and administrative burden for handlers and the Board.

For the reasons stated above, it is recommended that § 984.50 be amended to remove quality and size regulations and include only the Board's authority to recommend regulations in the future if market conditions warrant and eliminate §§ 984.51 and 984.52 inspection and certification of inshell and shelled walnuts and shelled walnuts for processing.

## **Material Issue Number 2 - New Assessment Mechanism and Interest and/or Charges for Late Payments**

Section 984.69 should be revised to change the calculation of assessments from kernelweight to inshell pound in paragraph (a), lift the stay for paragraph (b) and add authority to establish an initial assessment rate for the new assessment mechanism in a new paragraph (b), and include authority to charge for late payments and/or interest as prescribed by the Board with approval from the Secretary in paragraph (c). The preamble in the notice of hearing incorrectly identified paragraph (b) as the authority to charge for late payments and/or interest. The recommended decision and the proposed regulatory text correctly refer to paragraph (c). Corresponding changes should be made to §§ 984.37, 984.48, 984.69, and 984.347. Specifically, §§ 984.37, 984.48, and 984.347 should be revised to modify the measure of weight for assessments from kernelweight to inshell pound.

In addition to the proposed new assessment mechanism, the Board is also recommending an initial assessment rate of \$0.0125 to go into effect at the conclusion of this rulemaking. This proposed amendment is summarized further under Material Issue No. 3.

According to the record, a new mechanism for determining and collecting handler assessments would need to be established if the proposed elimination of mandatory inspection and certification summarized under Material Issue No. 1 were implemented. Witnesses at the hearing expressed that the elimination of mandatory inspection and certification, or the outgoing inspection, disables the Board's ability to collect assessments. This is due to provisions in § 984.69 which states that each handler's pro rata share is the assessment rate per kernelweight pound multiplied by the kernelweight of walnuts certified. Therefore, the Order as currently written ties the calculation of assessments to inspection and certification.

According to the record, the new assessment mechanism would be based on walnuts received instead of walnuts certified which would allow the Board to resume collecting assessments. Under the proposed mechanism, the calculation of assessments would be based on receipts submitted to the Board. All nine witnesses testified their support for the proposed amendment, citing that it is an equitable change that would decrease the administrative burden for handlers and the Board.

Witnesses testified that California Walnut Board (CWB) Form No. 1, which is supplied to handlers by the Board in their annual season packets, would be the basis for the application of the assessment rate to be paid by handlers under the proposed new assessment mechanism, and since this report is already provided to the Board, it would ensure there is no additional burden placed on handlers. On CWB Form No. 1, handlers report walnut receipts by county and variety in inshell pounds, and therefore evidence suggests that the proposed amendment to change the calculation of assessments from

kernelweight to inshell pounds is to reflect the new assessment mechanism that would be based on walnut receipts reported on CWB Form No. 1.

Under the Order, § 984.473 requires each handler to report to the Board walnut receipts from growers on or before January 15 of each marketing year. Handlers fill out CWB Form No. 1 or the Crop Acquisition Report to report all walnuts received during the crop year. Currently, the Board uses this information for the purpose of developing an annual report that shows total crop acquisition in aggregate for the marketing year.

Alternatives to CWB Form No. 1 were also discussed, such as the CWB Form No. 6, the Report of Merchantable Walnuts Received, Committed, and Shipped. This report also includes an acquisition total; however, witnesses testified that CWB Form No. 6 is a monthly report and it conflicts with the structure of the proposed new assessment mechanism which would stagger billing throughout the year. In addition, using CWB Form No. 1 reduces the administrative burden for handlers and the Board as it is an annual report.

Additionally, the new assessment mechanism is modeled after the assessment method applied by the California Walnut Commission (Commission). One witness explained that the Commission's process is also based on receipts, and that it is a self-reported system where handlers submit forms during the year on behalf of growers. The Commission's assessment process is also based on inshell weight received or acquired, and consideration was taken to ensure that the staggering of assessments did not match the Commission's. This further ensures any inadvertent undue burden is not place on handlers.

According to the record, for the first time for the 2021-2022 marketing year, the Board has included handler audits in its compliance plan. This is to ensure receipts reported on CWB Form No. 1 are accurate. Under the proposed assessment mechanism, the Board plans to audit handler receiving records, and one witness testified that receipt



numbers can also be cross-checked with information shared between the Board and the Commission. This is within the authority of the Board as § 984.80 provides that each handler shall maintain records of walnuts received, held, or disposed of as prescribed by the Board, and such records shall be retained and be available for examination by the Board and Secretary for a period of two years. In addition, § 984.91 provides that the Board may deliberate, consult, cooperate and exchange information with the Commission, whose activities complement the Board.

Under the proposed new assessment mechanism, invoicing would not begin until after January 15 which is when CWB Form No. 1 is due, and billings would be staggered later in the year to allow handlers to pay in three installments. Billings would be generated in January, April, and July and as prescribed by the Board, payments would be due in February, May, and August. This is contrary to the current billing system where handlers are invoiced monthly. One witness testified that under the current system, approximately 48 percent of the total revenue for the year is invoiced by January and when compared to the proposed mechanism, only 33.33 percent of the total annual revenue would be billed in that same timeframe.

The following is a sample calculation showing how assessments would be determined under the new proposed mechanism. In the sample calculation, handler A reported receipts of 1 million inshell pounds on CWB Form No. 1 for the 2023 crop year. To calculate handler A's total annual assessment under the proposed new assessment mechanism, multiply the proposed initial assessment rate by the total pounds received for a result of \$12,500 (1 million x \$0.0125 = \$12,500). To calculate handler A's assessment billings, multiply the total annual assessment by 33.33 percent for a result of \$4,166.66 to be invoiced in January, \$4,166.67 to be invoiced in April, and a final sum of \$4,166.67 to be invoiced in July.

#### SAMPLE CALCULATION FOR ASSESSMENTS

Handler A reported acquisitions for 2023 marketing year = 1,000,000 pounds multiplied by \$.0125 = \$12,500

Assessments to be invoiced as follows:

Invoice 1 – Jan - \$12,500 multiplied by 33.33% = \$4,166.66

Invoice 2 – Apr - \$12,500 multiplied by 33.33% = \$4,166.67

Invoice 3 – Jul - \$12,500 multiplied by 33.33% = \$4,166.67

Total invoiced: \$12,500.00

During the hearing, USDA sought testimony on § 984.67 and specifically on exemptions from assessments and quality regulations. Currently, § 984.67(b)(1) in the Code of Federal Regulations references a list that is missing in error. In addition, § 984.67(b) is missing other exemptions from assessments and quality regulations – specifically for green walnuts and walnuts directed to noncompetitive outlets. Witnesses testified that § 984.67 provides stipulations for walnuts handled that are exempt from assessments and quality regulations under the Order such as for charitable institutions, relief agencies, governmental agencies for school lunch programs, and diversion to animal feed or oil manufactures pursuant to an authorized governmental diversion program. All industry witnesses testified in support of adding the missing text back to § 984.67(b) with some witnesses stating that they were unaware that the exemptions list was missing or incomplete, and that immediate reinsertion would benefit the industry as it would be unfair to penalize handlers for not paying assessments on product otherwise considered exempt.

A witness provided a sample calculation of how exemptions from assessments would be applied. In the hypothetical scenario illustrated below, handler A from the previous example reported that 10 thousand pounds was sold to USDA under section 32 of the Agricultural Adjustment Act Amendment of 1935. Handler A reported this after the first invoice for the marketing year was issued. To calculate handler A's exemption, multiply the total pounds exempt by the proposed assessment rate for an exempt amount

of \$125.00 (10,000 pounds x \$0.0125 = \$125). Subsequently, the next invoice billed to handler A (in this scenario it would be April) would show an adjusted assessment of \$4,041.67 as a result of a \$125.00 reduction due to exemptions.

#### SAMPLE CALCULATION FOR EXEMPTION APPLICATION

On March 31, Handler A reported 10,000 pounds sold to USDA for a Section 32 purchase.

10,000 pounds multiplied by \$.0125 = \$125

Assessments to be invoiced as follows:

Invoice 1 – Jan - \$12,500 multiplied by 33.33% = \$4,166.66 – was already invoiced

Invoice 2 – Apr - \$12,500 multiplied by 33.33% = \$4,166.67 - \$125.00 – less exemption amount

Invoice 2 adjusted amount = \$4,041.67 – new invoice amount

Invoice 3 – Jul - \$12,500 multiplied by 33.33% = \$4,166.67

Total invoiced: \$12,375.00

According to the record, for exemptions that occurred after July, the last invoice in the marketing year, a refund check in the amount exempt would be issued by the Board to handlers. This ensures handlers receive a timely refund against current year assessments. Similarly, handlers that report adjustments to CWB Form No. 1 after January 15 of the marketing year would also receive a readjustment to their total annual assessments.

For the reasons stated above, it is recommended that § 984.67 be amended to add the text inadvertently omitted. Regarding the proposed amendment to revise § 984.69(c) to add the authority to charge for late payments and/or interest as recommended by the Board, subject to the approval of the Secretary, witnesses testified that if implemented, the proposal will enable the Board to further encourage compliance through the common business practice of assessing interest and late-payment charges.

According to the record, the industry has minimal issues with collection, but the standard business practice of interest and late payment charges is a tool that would help

the Board execute the collection of assessments and administer the Order. One witness testified that currently under the Board's compliance plan a past-due notice is issued at 60 days, a second notice at 90 days, and then at 150 days outstanding the assessment is then referred to USDA. Under the proposed amendment, the Board may decide to not implement the authority; however, witnesses testified that the authority to recommend late-payment charges in the future would increase the equitability of the collection of assessments, as late fees would be applied equally across all handlers.

Additionally, the requirements of the new assessment mechanism and application of interest and late-payment charges as recommended by the Board and approved by the Secretary, would be communicated to handlers through their annual handler packets that are mailed at the beginning of each marketing year, and include a personalized cover letter for each handler, a copy of the annual handler regulations, a full set of Board forms, and a copy of the Order.

On February 24, 2022, the Board voted unanimously in favor of the proposed amendments recommended by the Executive Committee to create a new assessment mechanism and to add authority to charge for late payments to the Order. Board and Committee meetings are open to the public, and both large and small operations had an opportunity to provide input into the proposed amendments. In addition, newsletters were mailed to growers and the proposed changes were discussed at the annual grower meeting where Board staff provided presentations on all potential changes to the Order.

For the reasons stated above, it is recommended that § 984.69 be revised to change the calculation of assessments from kernelweight to inshell pound in paragraphs (a) and (c) be revised to include an authority to charge for late payments and/or interest as recommended by the Board, subject to the approval of the Secretary. It is also recommended that corresponding changes be made to §§ 984.37, 984.48, 984.69, and 984.347.

### **Material Issue No. 3 – Initial Assessment Rate**

Section 984.69(b) should be revised to include the authority to establish an initial assessment rate and § 984.347 should be amended to establish an initial assessment rate of \$0.0125 per inshell pound of walnuts. The establishment of an initial assessment rate would allow the Board to resume the collection of assessments after the conclusion of this rulemaking and 30 days after the publication of the final rule in the **Federal Register**, if implemented.

As mentioned in several places throughout this recommended decision, the moratorium on the enforcement of mandatory inspections effective September 1, 2022, prevents the Board from collecting assessments due to § 984.69(a) which bases the calculation of assessments on walnuts certified. While the moratorium is in effect, Board activities and programs are sustained through the use of operational funding from the Board's existing but depleting financial reserve funds. Evidence suggests that the establishment of the initial assessment rate is to ensure the Board will have the ability to generate funds in the upcoming marketing year. Witnesses explained that the formal rulemaking process could take between 18 and 24 months, and during this time the Board is operating entirely off its reserves. Therefore, the ability of the Board to assess upon implementation is important to be able to resume its full scope of activities.

According to the record, on November 19, 2021, the Marketing Order Revision Committee recommended the initial assessment rate to the Board. Witnesses testified that discussions were robust, and several alternatives were proposed. Rates as high as 2 cents or as low as zero were considered by the Board. Ultimately, the Board voted in favor of an initial assessment rate of \$0.0125, 7 to 2. It was concluded that, without an established rate, programs would be limited and the Board would not be able to conduct business in the year the proposed amendments would take effect if implemented. Additionally, evidence suggests that due to low pricing further consideration was taken to

ensure the proposed rate is reasonable and it does not appear as though the Board is trying to recapture years without assessments. Witnesses testified that the proposed rate of \$0.0125 is lower than the rate originally proposed for the current season and is also lower than the rate for the last 4 out of the 5 years prior to the 2021/22 season. The Board decided that an initial assessment rate of \$0.0125 would be reasonable for handlers and would allow the Board to cover operating costs and conduct the marketing activities needed for the domestic market.

The notice of hearing incorrectly had an assessment rate of \$.125 in the regulatory text. The recommended decision corrects the assessment rate to reflect the Board's intent and testimony.

In addition, § 984.68 of the Order provides that the Board must file a proposed budget of expenses and a rate of assessment at the beginning of each marketing year and the determination of the initial rate would not supersede that.

For the reasons stated above, it is recommended that § 984.69(b) be revised to include the authority to establish an initial assessment rate which may be modified by the Secretary and § 984.347 be amended to establish the initial assessment rate of \$0.0125 per inshell pound of walnuts.

#### **Material Issue No. 4 – The Definition of To Handle**

Section 984.13 should be modified to include the word “receive” in the definition of “to handle”. Modifying the definition would broaden its scope to include the receipt of either inshell or shelled walnuts (except as a common contract carrier or walnuts owned by another person) to be put into the current of commerce either within the area of production or from such area to any point outside thereof, or for a manufacturer or retailer within the area of production to purchase directly from a grower. This does not include sales and deliveries within the area of production by grower to handlers, or between handlers.

According to the record, expanding the definition would allow the Board to use the Acquisition Report, or CWB Form No. 1, required by each handler before January 15 of each marketing year, as the basis for the calculation of assessments to be collected under the proposed new assessment mechanism summarized in Material Issue No. 2.

Currently, handlers are assessed on product certified, and evidence suggests that the Board's intention for expanding the definition to include "receive" is to ensure all handlers that receive walnuts are assessed under the proposed new assessment mechanism and also to clearly tie assessments with walnuts received. Witnesses testified that the act of handling begins when a handler receives and takes possession of the product and therefore expanding the definition would ensure product does not slip through the system unassessed or unaccounted.

According to the record, this is a necessary change that is a result of the proposed elimination of inspections and certification that currently ties assessments with walnuts certified, and that modifying the definition would enable the alignment of the proposed amendments discussed in this recommended decision. Additionally, handlers are expected to benefit from the modified definition as it allows for the application of the proposed assessment mechanism which would reduce the administrative burden for both handlers and the Board.

For the reasons stated above, it is recommended that § 984.13 be modified to include the word "receive" in the definition of "to handle".

#### **Material Issue No. 5 - Volume Control Authority**

Section 984.49 "Volume regulation", reserve pool authority, and subsequent sections including provisions for volume control should be removed. This includes removing: §§ 984.23, 984.26, 984.33, 984.54, 984.56, 984.66, 984.69(b), 984.450(a) and (b), 984.451(c), 984.456, and 984.464(a) and revising: §§ 984.48 and 984.67. Removing

volume control authority would modernize the Order by eliminating regulations the industry considers no longer necessary to ensure orderly marketing.

Witnesses testified that the industry is fundamentally different than it was 30 years ago and does not foresee using volume regulation in the future. Currently, volume regulation is suspended indefinitely, effective May 7, 2020 (85 FR 27109). According to the record, volume regulations were suspended because they had not been used in over 30 years. As previously stated under Material Issue No. 1, witnesses argued that in the current economic environment, low pricing is a result of increases in global supply. Therefore, restricting sales of California walnuts would not be in the best interest of the industry which is primarily focused on increasing market demand through research and promotion.

For the reasons stated above, it is recommended that § 984.49 “Volume regulation” and reserve pool authority should be removed. Corresponding changes to subsequent sections including provisions for volume control should also be removed. This includes removing: §§ 984.23, 984.26, 984.33 984.54, 984.56, 984.66, 984.69(b), 984.450(a) and (b), 984.451(c), 984.456, and 984.464(a) and revising: §§ 984.48 and 984.67.

#### **Material Issue No. 6 – USDA’s Conforming Changes**

Based on record evidence, USDA is recommending the following conforming changes to the Order: adding language regarding exemptions to § 984.67; removing the reference to “merchantable” in § 984.22 and from the headings and paragraphs in §§ 984.72 and 984.472(a) and (c); revising the heading in § 984.21; revising §§ 984.69(e) and 984.89(b)(4) to replace the term “fiscal period” with “marketing year”; and revising the figure in § 984.347.

As described above in Material Issue #2, USDA is recommending a conforming change to § 984.67 to add language inadvertently omitted in a prior rulemaking



conducted in May 2020. Witnesses testified in support of adding exemptions that had been inadvertently omitted back to § 984.67.

A conforming change to remove the word “merchantable” from § 984.22 and from the headings and paragraphs in §§ 984.72 and 984.472(a) and (c) is necessary to add clarity to the Order. In § 984.11, “merchantable walnuts” are defined as “walnuts meeting the minimum grade and size regulations effective pursuant to § 984.50.” If the proposed amendments described in Material Issue #1 are implemented, there would be no “merchantable walnuts” because there would be no grade and size regulations in effect. Witnesses testified that this was their understanding of the effect of the proposed amendments described in Material Issued #1. Witnesses also testified in favor of removing numerous references to the term “merchantable” in various sections, including § 984.48. Similarly, witnesses testified to amendment of § 984.472(b) to ensure that reporting requirements for shipped walnuts would continue.

Accordingly, USDA proposes that references to “merchantable” be removed from other reporting requirements to ensure that such reporting requirements continue to be in place. USDA proposes that the reference to “merchantable” be removed from § 984.22 to ensure that the marketing policy in § 984.48 includes an estimate of trade demand. USDA proposes that the reference to “merchantable” be removed from the heading and text of § 984.72 to make clear that the authority for reports extends to walnuts rather than the subset of “merchantable walnuts”. Similarly, USDA proposes conforming changes to remove references to the term “merchantable” in § 984.472(a) and (c). This would ensure that walnuts that are received and that are committed continue to be reported to the Board.

Section 984.50 would continue to provide authority for grade, quality, and size regulations in the event that such regulations are warranted in the future. If specific grade, quality, and size regulations are promulgated and implemented in the future, the

term “merchantable walnuts” (“walnuts meeting the minimum grade and size regulations effective pursuant to § 984.50”) would once again have meaning and effect.

Accordingly, the definition for “merchantable walnuts” and similarly related sections that reference the word “merchantable” in the Order would not be affected by the proposed amendments. Specifically, §§ 984.11, 984.12, and 984.64 would continue to reference “merchantable walnuts.”

In addition, as noted in the notice of hearing, the heading in § 984.21 would be revised to reflect the purpose of the provision. The provision defines handler inventory and accordingly, USDA proposes to rename the heading “Handler inventory” from “Eligibility.”

USDA proposes to revise §§ 989.69(e) and 984.89(b)(4) to replace the term “fiscal period” with “marketing year.” “Marketing year” is already used in another provision of § 989.69. Moreover, “marketing year” is defined in and used throughout the Order.

Finally, as discussed in Material Issue #3 USDA notes that there was an error in § 984.347 in the notice of hearing, in which the assessment rate was listed as \$.125. Witnesses testified that the assessment rate should be \$.0125, and the recommended decision reflects this.

### **Initial Regulatory Flexibility Analysis**

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

During the hearing held April 19-20, 2022, interested parties were invited to present evidence on the probable regulatory impact on small businesses of the proposed amendments to the Order. The evidence presented at the hearing shows that the proposed amendments would not have a significant negative economic impact on a substantial number of small agricultural producers or handlers.

A small handler, as defined by the Small Business Administration (SBA) (13 CFR 121.201), is one that grosses less than \$30 million annually. A small walnut producer is one that grosses less than \$3.25 million annually.

Effective May 2, 2022, SBA issued a final rule updating small business size standards for agriculture (86 FR 18607). The tree nut farming (North American Industry Classification System (NAICS) code 111335) size standard changed from \$1 million to \$3.25 million. The witnesses that identified themselves as small producers did so using the SBA size standard in effect at the time of the hearing (\$1.0 million); they are also small under the new standard of \$3.25 million.

A total of nine witnesses testified at the hearing. Of the nine witnesses, seven appeared and offered testimony as growers or handlers. Five of these seven witnesses were growers and four of the growers were also handlers. Two of five grower witnesses testified that they were small walnut growers according to the former SBA definition of \$1.0 million, and three were large.

Of the six handler witnesses, two were small and four were large. Of the four grower witnesses who were also handlers, one was a small handler, and three were large. There were two additional handler witnesses, one small and one large.

Of the remaining two witnesses, one provided testimony from the perspective of academia and the other witness provided testimony as a representative of the California Walnut Board.

All witnesses expressed their support for the proposed amendments and stated that they expected to see significant benefits (cost savings) from the amendments.

### **Walnut Industry Background and Overview**

According to the hearing record there are approximately 4,500 producers and 85 handlers in the production area. Record evidence includes reference to a study showing that the walnut industry contributes 85,000 jobs to the economy, directly and indirectly.

Record evidence showed that approximately 82 percent of California's walnut handlers (70 out of 85) shipped merchantable walnuts valued under \$30 million during the 2018-2019 marketing year and would therefore be considered small handlers according to the SBA definition.

Data in the hearing record from the 2017 Agricultural Census, published by USDA's National Agricultural Statistics Service (NASS), showed that 86 percent of the California farms growing walnuts had walnut sales of less than \$1 million. In the 2017 Agricultural Census, the largest sales value size category for walnuts was \$1.0 million.

To estimate the percentage of small walnut farms, using NASS data from the hearing record, the first step was computing a 3-year average crop value, which was \$1.077 billion for the period 2018/19 to 2020/21. Average bearing acres over that same 3-year period were 372,500. Dividing crop value by acres yields a revenue per acre estimate of \$2,892. Using these numbers, it would take approximately 1,124 acres ( $\$3,250,000 / \$2,892$ ) to yield \$3,250,000 in annual walnut sales. The 2017 Agricultural Census data show that 94 percent of walnut farms in 2017 were below 1,000 acres. Therefore, 94 percent or more of California walnut farms would be considered small businesses according to the current SBA definition.

Hearing evidence showed that the period from walnut tree planting production ranges from 5 to 7 years, and that production levels each year are somewhat affected by the alternate bearing tendency. The pricing downturn that began in 2015 somewhat

diminished the rate of new plantings, but about 36,000 previously planted acres are expected to come into production in the next 3 years (2023 to 2026). These are high-yield varieties, and therefore the new acres will be more productive than the walnut acreage being removed.

According to the record, generally all domestic production of walnuts is grown in the Central Valley region, which includes the Sacramento Valley and the San Joaquin Valley. The San Joaquin Valley is one of only five major Mediterranean-type climates in the world that is ideal for growing nuts. Over the past 10 years, walnut acreage has migrated north for better water availability. Production in the northern part of the Central Valley is expected to grow significantly, and the proportion of total production in the south is expected to decline.

Walnut trees bloom in the spring and the harvest for early varieties starts in September. Harvesting for later varieties starts in October and sometimes continue into November. The Chandler variety is 58 percent of total walnut production. Three varieties (Chandler, Howard, and Tulare) make up eighty-five percent of total walnut volume. As soon as the nuts are harvested, they must be hulled (removal of the green husk) and dried. The hulled nuts have too high a moisture content for long-term storage, and they need to be dried quickly to preserve quality and to minimize mold and rancidity. Growers still own the nut at that point, according to hearing evidence.

The processor (handler) then buys the nuts based on the cleaned, hulled and dried weight. The handlers process and store them before and after the value-added steps, before shipping them into distribution channels.

Once received by the handler, the walnuts go into refrigerated or bulk storage, depending on the type of product that the handler intends to produce. Smaller lots (such as for minor varieties) are put into bin storage. Once the walnuts are warehoused and fumigated (to eliminate insects) a sample is taken to determine the value of the product to

the producer. The walnuts are tested for kernel content, edible kernel content, defect levels, and color. The lighter the color, the greater the value. The three predominant colors are light, light amber and amber.

The shelling process removes most of the shell, typically leaving about 98 percent kernel and 2 percent shell. The resulting lot has nuts with a mixture of colors and approximately six different sizes, ranging from eight-of-an-inch square up to a half kernel.

Walnuts generally have a 12-month shelf life, which can be moderately increased through improved storage conditions and may be reduced if storage conditions are not ideal. Cold storage has facilitated year-round sales and marketing. Witnesses stated that advancements in processing and packaging technologies continue to improve product quality, consistency and shelf life.

Some packaging methods, including vacuum packing, will increase shelf life and help maintain quality. Walnuts can also be pasteurized to reduce pathogens. Modified atmosphere storage requires substantial capital, including automation of storage chamber loading and unloading because the low oxygen environment is dangerous for forklift drivers.

On the handler process lines, key pieces of equipment are laser sorters and optical camera sorters, which can sort by color and shape. Broad spectrum analyses (using infrared and ultraviolet) are increasingly effective at identifying defects. Mechanical air injection systems use jets of air to remove individual nuts identified as defective.

A key factor in quality improvement are new varieties, including Chandler, Howard, Pillory, Ivanhoe and Sawano. With these varieties, shell removal is much easier, leaving far fewer fragments and pieces. Recent technology improvements have also greatly reduced the incidence of foreign material and shell pieces to a level that is far below what is allowed under USDA standards, which were established decades earlier.

With the new varieties, the kernel color is much lighter, and the nuts are larger. In addition, advances in processing equipment produce a much higher percentage of “pristine halves”. Witnesses testified that these three key characteristics yield more money to industry stakeholders but are not accounted for in USDA standards.

According to hearing evidence, prior to the inspection moratorium, large volume handlers typically had DFA staff working from a space close to their own quality assurance (QA) staff. DFA conducted quality tests from in-line samples with processes that largely paralleled those of the handler QA staff, but DFA applied the less stringent USDA standards. For smaller volume handlers, the DFA staff tested nuts based on samples from packaged products on the packing floor (floor inspection). For the mandatory outbound inspection, no product could leave the processing facility without USDA certification issued by DFA.

Before the inspection moratorium, operational inefficiencies for handlers included sometimes having to wait for qualified DFA inspection staff to show up to certify lots in a timely manner, adding to an already challenging shipping environment. Hearing evidence suggests that the elimination of mandatory inspection, and being able to self-certify according to customer specifications that are well above USDA standards, would be a significant benefit of the proposed changes to handlers of all sizes. Some handlers may continue to use DFA inspection service for quality control; however, hearing evidence shows industry is undergoing a transition away from the traditional practice of third party inspections for greater cost savings.

Witnesses reported that another improvement in operational efficiency, and reduced paperwork burden, that would result from the proposed amendments is changing from monthly handler assessments to three installments to be paid in February, May, and August.

In summary, hearing evidence points to major technological improvements in sorting, processing and storage, and adoption of new varieties, as key evidence of how current industry practices result in walnut quality that exceeds USDA standards, making mandatory outgoing inspection unnecessary.

### **Estimated Economic Impact of Eliminating Mandatory Inspection**

A key economic impact of the marketing order amendment is the cost reduction to industry stakeholders of eliminating mandatory inspection. Hearing evidence showed that an estimate of the inspection cost is approximately \$6 million per year. This cost reduction figure represents a key benefit to the industry of implementing these amendments.

Table 2 illustrates the inspection cost estimate. Multiplying the total quantity of California walnuts marketed in 2020 (783,500 tons) times the average inspection cost of \$7.7024 per ton) yields the total annual mandatory inspection cost estimate of \$6,034,830 shown in Table 2. These numbers represent the costs incurred by handlers for the inspection services supplied by DFA, the Board’s inspection agency of record.

The proportion of the crop marketed as inshell and shelled are 42 and 58 percent, respectively. These proportions are used to show how the \$6.035 million inspection cost is allocated to the inshell and shelled portions of the total U.S. walnut market.

Table 2 Estimated Annual Cost Mandatory Walnut Inspection 1/

	<b>Inshell</b>	<b>Shelled</b>	<b>Total</b>	<b>Computational Detail</b>	
<b>Share of sales (%)</b>	42%	58%	100%	A	
<b>Volume (tons)</b>	329,070	454,430	783,500	B	A*total volume
<b>Inspection Cost (\$ per ton) 2/</b>	\$6.09	\$8.87	\$7.7024	C	
<b>Total inspection cost 2/</b>	\$2,004,036	\$4,030,794	\$6,034,830	D	B*C

1/ This table is based on Exhibit 16A of the walnut marketing order amendment hearing, which used data supplied by California Walnut Board.



2/ Total inspection cost of \$6,034,830 in this table is the sum of the inshell and shelled cost and represents a slight upward adjustment from the total cost figure of \$6,032,950 in hearing Exhibit 16A. This revised total cost figure was used to compute a revised inspection cost per ton of \$7.7024, representing an average industry cost, combining inshell and shelled. This is slightly higher than the \$7.70 cost figure presented in Exhibit 16A.

Hearing evidence also pointed to other benefits, such as lower indirect costs to handlers. Witnesses stated that handlers would benefit from reduced operational process redundancies, resulting in lower associated costs and administrative burdens. An additional efficiency for handlers is that the proposed new marketing order assessment mechanism utilizes the same process already in use by handlers for their payment to the California Walnut Commission.

In addition, producers may also benefit from higher grower returns through cost savings passed on from increased handler efficiencies.

The record shows that there would be no negative quality implications from implementing the proposed amendments, and consumers already benefit from California walnut quality that surpasses USDA grade standards. Consumers may also benefit from lower prices resulting from reduced handler costs. If the proposed amendments and accompanying conforming changes were implemented, both benefits and costs savings could be anticipated. For the reasons described above, it is determined that the benefits of eliminating mandatory inspection and certification of inshelled and shelled walnuts, and of shelled walnuts for processing; creating a new mechanism for determining and collecting handler assessments; adding authority to charge interest for late payments; establishing an assessment rate of \$0.0125 per inshell pound of walnuts; expanding the definition of “to handle” to include “receive”, and removing volume control authority would modernize and align the Order with current market-driven practices that would result in a more efficient industry.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. These amendments are intended to improve the

operation and administration of the Order and to assist in the marketing of California walnuts.

Board meetings regarding these proposals, as well as the hearing date and location, were widely publicized throughout the California walnut industry, and all interested persons were invited to attend the meetings and the hearing to participate in Board deliberations on all issues. All Board meetings and the hearing were public forums, and all entities, both large and small, were able to express views on these issues. Interested persons are invited to submit information on the regulatory impacts of this action on small businesses.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

### **Paperwork Reduction Act**

Current information collection requirements that are part of the Federal marketing order for California walnuts (7 CFR part 984) are approved under Office of Management and Budget (OMB) No. 0581-0178, Vegetables and Specialty Crops. No changes in these requirements are anticipated as a result of this proceeding. Should any such changes become necessary, they would be submitted to OMB for approval.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

### **Civil Justice Reform**

The amendments to the Order proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of entry of the ruling.

### **Rulings on Briefs of Interested Persons**

Briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth in this recommended decision. To the extent that the suggested findings and conclusions filed by interested persons are inconsistent with the findings and conclusions of this recommended decision, the requests to make such findings or to reach such conclusions are denied.

### **General Findings**

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of the marketing agreement and order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(1) The marketing order, as amended, and as hereby proposed to be further amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing order, as amended, and as hereby proposed to be further amended, regulates the handling of walnuts grown in the production area (California) in the same manner as, and is applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing order upon which a hearing has been held;

(3) The marketing order, as amended, and as hereby proposed to be further amended, is limited in its application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing order, as amended, and as hereby proposed to be further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of walnuts grown in the production area; and

(5) All handling of walnuts grown in the production area as defined in the marketing order is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

A 30-day comment period is provided to allow interested persons to respond to this proposal. All written exceptions received within the comment period will be considered, and a producer referendum will be conducted before any of these proposals are implemented.

#### **List of Subjects in 7 CFR Part 984**

Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR part 984 as follows:

#### **PART 984 – WALNUTS GROWN IN CALIFORNIA**

1. The authority citation for 7 CFR part 984 continues to read as follows:

**Authority:** 7 U.S.C. 601-674.

2. Revise § 984.12 to read as follows:

**§ 984.12 Substandard walnuts.**

*Substandard walnuts* means all walnuts (whether inshell or shelled) that do not meet the minimum standard prescribed for merchantable walnuts whenever regulations are in effect pursuant to § 984.50.

3. Revise § 984.13 to read as follows:

**§ 984.13 To handle.**

*To handle* means to receive, pack, sell, consign, transport, or ship (except as a common or contract carrier of walnuts owned by another person), or in any other way to put walnuts, inshell or shelled, into the current of commerce either within the area of production or from such area to any point outside thereof, or for a manufacturer or retailer within the area of production to purchase directly from a grower. However, sales and deliveries by a grower to handlers, hullers, or other processors within the area of production shall not, in itself, be considered as handling by a grower. The term “to handle” shall not include sales and deliveries within the area of production between handlers.

4. In § 984.21, revise the section heading to read as follows:

**§ 984.21 Handler inventory.**

\* \* \* \* \*

**§ 984.22 [Amended]**

5. In § 984.22(a) and (b), remove the word “merchantable”.

**§§ 984.23 and 984.26 [Removed and Reserved]**

6. In §§ 984.23 and 984.26, lift the stays of May 7, 2020, and remove and reserve the sections.

7. Revise § 984.32 to read as follows:

**§ 984.32 To certify.**

*To certify* means the issuance of a certification of inspection of walnuts in accordance with regulations issued pursuant to § 984.50.

**§ 984.33 [Removed and Reserved]**

8. In § 984.33, lift the stay of May 7, 2020, and remove and reserve the section.

9. In § 984.37, revise paragraphs (b) and (c)(4) to read as follows:

**§ 984.37 Nominations.**

\* \* \* \* \*

(b) Nominations for handler members shall be submitted on ballots mailed by the Board to all handlers in their respective Districts. All handlers' votes shall be weighted by the weight of inshell walnuts handled by each handler during the preceding marketing year. Each handler in the production area may vote for handler member nominees and their alternates. However, no handler with less than 35% of the crop shall have more than one member and one alternate member. The person receiving the highest number of votes for each handler member position shall be the nominee for that position.

(c) \* \* \*

(4) Nominations for handler members representing handlers that do not handle 35% or more of the crop shall be submitted on ballots mailed by the Board to those handlers. The votes of these handlers shall be weighted by the weight of inshell walnuts handled by each handler during the preceding marketing year. Each handler in the production area may vote for handler member nominees and their alternates of this paragraph (c)(4). However, no handler shall have more than one person on the Board either as member or alternate member. The person receiving the highest number of votes for a handler member position of this paragraph (c)(4) shall be the nominee for that position.

\* \* \* \* \*

10. In § 984.48:

- a. Revise the introductory text of paragraph (a);
- b. Remove the words “merchantable and substandard” in paragraph (a)(3);
- c. Lift the stays of May 7, 2020, on paragraphs (a)(6) and (7) and remove both paragraphs; and
- d. Redesignate paragraphs (a)(8) and (9) as paragraphs (a)(6) and (7), respectively.

The revision reads as follows:

**§ 984.48 Marketing estimates and recommendations.**

(a) Each marketing year the Board shall hold a meeting, prior to October 20, for the purpose of recommending to the Secretary a marketing policy for such year. Each year such recommendation shall be adopted by the affirmative vote of at least 60% of the Board and shall include the following:

\* \* \* \* \*

**§ 984.49 [Removed and Reserved]**

11. In § 984.49, lift the stays of August 7, 1995, and May 7, 2020, and remove and reserve the section.

12. In § 984.50, lift the stay of May 7, 2020, on paragraph (e) and revise the section to read as follows:

**§ 984.50 Grade, quality, and size regulations.**

(a) The Board may recommend, subject to the approval of the Secretary, regulations that:

(1) Establish handling requirements for particular grades, sizes, or qualities, or any combination thereof, of any or all varieties or classifications of walnuts during any period;

(2) Establish different handling requirements and tolerance limits for particular grades, sizes, or qualities, or any combination thereof, for different market destinations;

(3) Establish different handling requirements for the processing of shelled walnuts and the handling thereof; and

(4) Establish inspection and certification requirements for the purposes of this paragraph (a) and paragraph (b) of this section.

(b) During any period regulations issued under this section are in effect, no handler shall handle or process walnuts into manufactured items or products unless they meet the applicable requirements under this section as evidenced by certification acceptable to the Board.

(c) Regulations issued under this section may be amended, modified, suspended, or terminated whenever it is determined:

(1) That such action is warranted upon recommendation of the Board and approval by the Secretary, or other available information; or

(2) That regulations issued under this section no longer tend to effectuate the declared policy of the Act.

**§§ 984.51 and 984.52 [Removed and Reserved]**

13. Remove and reserve §§ 984.51 and 984.52.

**§§ 984.54 and 984.56 [Removed and Reserved]**

14. In §§ 984.54 and 984.56, lift the stays of May 7, 2020, and remove and reserve the sections.

15. Revise § 984.64 to read as follows:

**§ 984.64 Disposition of substandard walnuts.**

During any period when regulations are in effect pursuant to § 984.50, substandard walnuts may be disposed of only for manufacture into oil livestock feed, or such others uses as the Board determines to be noncompetitive with existing domestic



and export markets for merchantable walnuts and with proper safeguards to prevent such walnuts from thereafter entering channels of trade in such markets. Each handler shall submit, in such form and at such intervals as the Board may determine, reports of his production and holdings of substandard walnuts and the disposition of all substandard walnuts to any other person, showing the quantity, lot, date, name and address of the person to whom delivered, the approved use and such other information pertaining thereto as the Board may specify.

**§ 984.66 [Removed and Reserved]**

16. In § 984.66, lift the stay of May 7, 2020, and remove and reserve the section.

17. In § 984.67:

- a. Lift the stay of May 7, 2020, on paragraph (a) and remove the paragraph;
- b. Redesignate paragraphs (b) and (c) as paragraphs (a) and (b), respectively; and
- c. Revise newly redesignated paragraph (a).

The revision reads as follows:

**§ 984.67 Exemptions.**

*(a) Exemptions from assessments and quality regulations--(1) Sales by growers direct to consumers.* Any walnut grower may handle walnuts of his production free of the regulatory and assessment provisions of this part if he sells such walnuts in the area of production directly to consumers under the following types of exemptions:

- (i) At roadside stands and farmers' markets;
- (ii) In quantities not exceeding an aggregate of 500 pounds of inshell walnuts of 200 pounds of shelled walnuts during any marketing year (at locations other than those specified in paragraph (a)(1)(i) of the section); and
- (iii) If shipped by parcel post or express in quantities not exceeding 10 pounds of inshell walnuts or 4 pounds of shelled walnuts to any one consumer in any one calendar day.

(2) *Green walnuts.* Walnuts which are green and which are so immature that they cannot be used for drying and sale as dried walnuts may be handled without regard to the provisions of this part.

(3) *Noncompetitive outlets.* Any person may handle walnuts, free of the provisions of this part, for use by charitable institutions, relief agencies, governmental agencies for school lunch programs, and diversion to animal feed or oil manufacture pursuant to an authorized governmental diversion program.

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18. In § 984.69, lift the stay of May 7, 2020, on paragraph (b) and revise the section to read as follows:

**§ 984.69 Assessments.**

(a) *Requirement for payment.* Each handler shall pay the Board, on demand, his or her pro rata share of the expenses authorized by the Secretary for each marketing year. Each handler's pro rata share shall be the rate of assessment per inshell pound of walnuts fixed by the Secretary times the pounds of walnuts received by him or her for his or her own account (except as to receipt from other handlers on which assessments have been paid). At any time during or after the marketing year the Secretary may increase the assessment rate as necessary to cover authorized expenses and each handler's pro rata share shall be adjusted accordingly.

(b) *Assessment rate.* The assessment rate set out may be modified by the Secretary, based upon a recommendation of the Board or other available data.

(c) *Late payment.* If a handler does not pay assessments within the time prescribed by the Board, the assessment may be increased by a late payment charge and/or an interest rate charge at amounts prescribed by the Board with approval of the Secretary.

(d) *Accounting.* If at the end of a marketing year the assessments collected are in excess of expenses incurred, such excess shall be accounted for in accordance with one of the following:

(1) If such excess is not retained in a reserve, as provided in paragraph (d)(2) or (3) of this section, it shall be refunded to handlers from whom collected, and each handler's share of such excess funds shall be the amount of assessments he or she has paid in excess of his or her pro rata share of the actual expenses of the Board.

(2) Excess funds may be used temporarily by the Board to defray expenses of the subsequent marketing year provided each handler's share of such excess shall be made available to him or her by the Board within five months after the end of the year.

(3) The Board may carry over such excess into subsequent marketing years as a reserve: Provided, that funds already in reserve do not exceed approximately two years' budgeted expenses. In the event that funds exceed two marketing years' budgeted expenses, future assessments will be reduced to bring the reserves to an amount that is less than or equal to two marketing years' budgeted expenses. Such reserve funds may be used:

(i) To defray expenses, during any marketing year, prior to the time assessment income is sufficient to cover such expenses;

(ii) To cover deficits incurred during any year when assessment income is less than expenses;

(iii) To defray expenses incurred during any period when any or all provisions of this part are suspended; and

(iv) To meet any other such costs recommended by the Board and approved by the Secretary.

(e) *Advanced assessments and commercial loans.* To provide funds for the administration of the provisions of this part during the part of a marketing year when

neither sufficient operating reserve funds nor sufficient revenue from assessments on the current season's certifications are available, the Board may accept payment of assessments in advance or may borrow money from a commercial lending institution for such purposes.

(f) *Termination.* Any money collected from assessments hereunder and remaining unexpended in the possession of the Board upon termination of this part shall be distributed in such manner as the Secretary may direct.

19. Revise § 984.72 to read as follows:

**§ 984.72 Reports of walnuts handled.**

Each handler who handles walnuts, inshell or shelled, at any time during a marketing year shall submit to the Board in such form and at such intervals as the Board may prescribe, reports showing the quantity so handled and such other information pertinent thereto as the Board may specify.

20. Revise § 984.77 to read as follows:

**§ 984.77 Verification of reports.**

For the purpose of verifying and checking reports filed by handlers or the operations of handlers, the Secretary and the Board through its duly authorized representatives shall have access to any premises where walnuts and walnut records are held. Such access shall be available at any time during reasonable business hours. Authorized representatives shall be permitted to inspect any walnuts held and any and all records of the handler with respect to matters within the purview of this part. Each handler shall maintain complete records on the receiving, holding, and disposition of both inshell and shelled walnuts. Each handler shall furnish all labor necessary to facilitate such inspections at no expense to the Board or the Secretary. Each handler shall store all walnuts held by him or her in such manner as to facilitate inspection and shall maintain adequate storage records, which will permit accurate identification of respective lots and

of all such walnuts held or disposed of theretofore. The Board, with the approval of the Secretary, may establish any methods and procedures needed to verify reports.

**§ 984.89 [Amended]**

21. In § 984.89(b)(4), remove the term “fiscal period” and add in its place the term “marketing year”.

22. Revise § 984.347 to read as follows:

**§ 984.347 Assessment rate.**

On and after September 1, 2023, an assessment rate shall be fixed at \$0.0125 per inshell pound of California walnuts.

**§ 984.450 [Removed and Reserved]**

23. In §984.450, lift the stays of May 7, 2020, on paragraphs (a) and (b) and remove and reserve the section.

**§ 984.451 [Removed and Reserved]**

24. In §984.451, lift the stay of May 7, 2020, on paragraph (c) and remove and reserve the section.

**§ 984.452 [Removed and Reserved]**

25. Remove and reserve § 984.452.

**§ 984.456 [Removed and Reserved]**

26. In § 984.456, lift the stay of May 7, 2020, and remove and reserve the section.

**§ 984.459 [Amended]**

27. In § 984.459, remove and reserve paragraph (a)(3).

**§ 984.464 [Removed and Reserved]**

28. In § 984.464, lift the stay of May 7, 2020, on paragraph (a) and remove and reserve the section.

29. Revise § 984.472 to read as follows:

**§ 984.472 Reports of walnuts, received, shipped, and committed.**

(a) Reports of walnuts shipped during a month shall be submitted to the Board on California Walnut Board (CWB) Form No. 6 not later than the 5th day of the following month. Such reports shall include all shipments during the preceding month and shall show for inshell and shelled walnuts: the quantity shipped; whether they were shipped into domestic or export channels; and for exports, the quantity by country of destination. If a handler makes no shipments during any month he/she shall submit a report marked "None." If a handler has completed his/her shipments for the season, he/she shall mark the report "Completed," and he/she shall not be required to submit any additional CWB Form No. 6 reports during the remainder of that marketing year.

(b) Reports of walnuts purchased directly from growers by handlers who are manufacturers or retailers shall be submitted to the Board on CWB Form No. 6, not later than the 5th day of the month following the month in which the walnuts were purchased. Such reports shall show the quantity of walnuts purchased.

(c) Reports of walnuts on which handlers have made purchase commitments with buyers during the month, but which have not yet been shipped, shall be submitted to the Board on CWB Form No. 6, not later than the 5th day of the month following the month in which the walnuts were committed. Such reports shall show the quantity of walnuts committed in either inshell or shelled pounds. If the handler made no commitments during any month, he/she shall mark "None" in the "Purchase Commitments" section of CWB Form No. 6.

30. Revise § 984.476 to read as follows:

**§ 984.476 Report of walnut receipts produced outside California or the United States.**

Each handler who receives walnuts from outside California or the United States shall file with the Board, on CWB Form No. 7, a report of the receipt of such walnuts. The report shall be filed as follows: On or before December 5 for such walnuts received

during the period September 1 to November 30; on or before March 5 for such walnuts received during the period December 1 to February 28 (February 29 in a leap year); on or before June 5 for such walnuts received during the period March 1 to May 31; and on or before September 5 for such walnuts received during the period June 1 to August 31.

The report shall include the quantity of such walnuts received, the country of origin for such walnuts, and whether such walnuts are inshell or shelled.

**Erin Morris,**

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